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No. 94-1630

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

NATIONAL AMUSEMENTS, INC.,

Petitioner,

vs.

TOWN OF DEDHAM,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

Argument:

Disputes of facts exist as to each of the evidientiary elements alleged to support Dedham's ban on midnight movies, as well as its motive for banning the midnight movies. 1

Conclusion 10

TABLE OF CITATIONS

Cases Cited:

Acorn Investments, Inc. v. Seattle, 887 F.2d 219 (9th Cir. 1989) 4

Church of The Lukumi Babalu Aye, Inc. v. City of Hialeah, __ U.S. __, 113 S. Ct. 2217 (1993) 8

Edenfield v. Fane, __ U.S. __, 113 S. Ct. 1792 (1993) 1, 7

Fantasy Book Shop, Inc. v. City of Boston, 652 F.2d 1115 (1st Cir. 1981) 2

Krueger v. Pensacola, 759 F.2d 851 (11th Cir. 1985) 4

Northend Cinema Inc. v. Seattle, 585 P.2d 1153 (Wash. 1978), *cert. denied*, 441 U.S. 946 (1979) 9

Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256 (1979) 8

Contents

Page

Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) ... 2, 8, 9

Rubin v. Coors Brewing Company, __ U.S. __, 115 S. Ct. 1585 (1995) 1, 5, 7

Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) 1, 2

Turner Broadcasting Systems, Inc. v. F.C.C., __ U.S. __, 114 S. Ct. 2445 (1994) 1, 7

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 2, 4

United States Constitution Cited:

First Amendment 1, 2, 3, 5, 6, 7, 10

ARGUMENT

DISPUTES OF FACT EXIST AS TO EACH OF THE EVIDENTIARY ELEMENTS ALLEGED TO SUPPORT DEDHAM'S BAN ON MIDNIGHT MOVIES, AS WELL AS ITS MOTIVE FOR BANNING THE MIDNIGHT MOVIES.

Where First Amendment values are at stake, this Court should be very wary of summary judgment, lest the requirements of its case law be sacrificed by foreshortened inquiry. This case presents a perfect instance in which to make that point.

Respondent's Brief only serves to confirm the existence of factual conflicts over the credibility of citizen complaints, the extent of constabulary concern and the legitimacy of alleged governmental interests. These factual issues should be resolved by the time-tested means of trial, for the alternative, is mere rational basis analysis — a standard of review wholly inappropriate with respect to governmental restrictions on First Amendment rights.[1]

Although a legislative body can act without first acquiring "irrefutable" proof, as the First Circuit ruled, (Pet. App. 21a), this Court still requires "substantial evidence" to sustain governmental regulation of speech activities, *Turner Broadcasting Systems, Inc. v. F.C.C.*, __ U.S. __, 114 S. Ct. 2445, 2471 (1994), which means more than anecdotal evidence coupled with educated guesses; *Rubin v. Coors Brewing Company*, __ U.S. __, 115 S. Ct. 1585, 1593 (1995); more than conjecture or speculation; *Edenfield v. Fane*, __ U.S. __, 113 S. Ct. 1792 1800 (1993); and certainly more than undifferentiated fear; *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S.

1. The First Circuit's decision leads to the same result, since it precludes objectively testing the very evidence which the Town proffers in support of the by-law.

503, 508 (1969). But, however much it is, is a question of fact that must be answered under objective criteria.

Moreover, Dedham's obligation to produce substantial evidence means it must do more than engage in rational basis analysis, which is what Respondent resorts to when it reads the "reasonable belief" language in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), to mean any belief will do. Indeed, given Respondent's argument, *Renton* would forever bar any adjudication of Dedham's regulation of speech activities, for members of Town Meeting are sure to believe what they complain about, even if their beliefs are wholly incredible, unfounded, conjectural and contradicted by other evidence - that is why some form of verification in the form of objective data is required to support Dedham's by-law banning midnight movies.[2]

In a [civilized] New England suburb like Dedham, racial animus, if it exists, is rarely made explicit.[3] That is the case here,

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2. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) supports the argument that citizen complaints alone cannot, without some form of objective quantifiable evidence, sustain the constitutionality of laws regulating speech. The regulation in *Ward* was based on the City's efforts to "monitor sound levels" not mere complaints about them; it was a model of municipal restraint and sensitivity to First Amendment values. Dedham, by contrast, made *no* effort to measure and define the real effects of the late shows.

Likewise, the First Circuit, in another case, upheld regulation of licensed entertainment *only* because "dispositive levels" of crime, traffic and noise were "susceptible to quantification and measurement," and therefore were subject to "meaningful judicial review." *Fantasy Book Shop, Inc. v. City of Boston*, 652 F.2d 1115 (1st Cir. 1981).

3. Respondent's repeated charge that the "racial animus" claim is a "desperate gamut [sic] to keep the case alive" is simply wrong. Resp. Br. at 24, 3-4, 15-16. In January 1991 Petitioner put forward a first draft of a statement of (Cont'd)

for during the course of this litigation, as the ground disappeared from under Dedham's allegations of neighborhood disturbance, evidence of racial animus surfaced.

Petitioner brought this case to challenge a by-law adopted by Dedham that concededly was aimed at banning "midnight movies", even though Petitioner's Showcase Cinemas had been exhibiting them *for more than ten years.* The movement for the ban began when a new resident solicited his neighbors by insinuating that midnight movie patrons were causing crime all over town. Unlike others who cloaked their racial fears in code words, this complainant went so far as to state, without the slightest backup, that "there were a lot of serious crime issues, riots that were stated as *race* riots at the Cinema." (R. A1702).[4] Citizens soon showed up at Town Meeting with what discovery later showed to be unsupported hyperbolic accusations that midnight movie patrons caused crime, traffic, noise and trash. They then promptly voted to ban all licensed entertainment in Town after 1 a.m.

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facts focused upon its First Amendment right to exhibit midnight movies and the restriction imposed by Dedham's by-law. Dedham did not respond to this draft until the District Court ordered it to do so in January 1993. Dedham's response asserted governmental interests in preventing crime, traffic, noise and trash. One month later, also in accord with the District Court's schedule, Showcase filed a reply questioning both the substantiality of the evidence supporting Dedham's asserted governmental interests and the credibility of its motive in light of indications of racial fear.

4. Contrary to Respondent's assertion this statement had nothing to do with the exhibition of "New Jack City" in 1991; rather it reflected the complainant's views at the time he circulated the Petition to ban the midnight movies, as confirmed by another neighbor who testified that this complaint was not so typical "because we never had a problem until that was brought to our attention" (R. A1003).

Intensive discovery showed that the citizen complaints were incredible, either because they were not based upon personal knowledge, they were exaggerated, they were conjectural or just plain lies. In the end, Dedham was left without a single complainant who could firmly attribute crime, traffic noise or trash to midnight movie patrons. Indeed, Dedham now concedes that crime complaints have never been probatively linked to the midnight movies.[5] Resp. Br. at 14.

When it comes to traffic noise, citizen complaints proved to be pure guesswork, for the neighborhood adjacent to Showcase Cinemas is bordered not just by Elm Street, where Showcase has one of its exits,[6] but also by Route 1, a major thoroughfare, and U.S. 95, a six-lane interstate highway; so traffic noise comes from all directions, most noticeably from Route 95 where cars and trucks travel along at 55 miles per hour all night. (R. A1930). Not one complainant could identify the location or source of traffic noise heard at night, much less the level of such noise. (*Compare,* the confirmation of noise levels in *Ward v. Rock Against Racism,* 491 U.S. 781 (1988).)

Likewise, the innuendo that the midnight movie patrons dropped trash all over town was never substantiated as more than a throw-away itself, since no one tried to determine whether the trash came from J.C. Hillary's, Burger King, Finian's, Papa

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5. Acknowledging that the incidents of crime in question occurred earlier than the late night shows, Dedham nonetheless argues that the town has a right to ban late night movies to protect itself against such occurrences that *could* happen later. This kind of predictive "justification" is precisely what was rejected by the Ninth and Eleventh Circuits in holdings that now squarely conflict with this one. *Acorn Investments, Inc. v. Seattle,* 887 F.2d 219 (9th Cir. 1989) and *Krueger v. Pensacola,* 759 F.2d 851 (11th Cir. 1985).

6. Significantly, in addition to Showcase, a hotel and a restaurant also exist on Elm Street next to the neighborhood.

Gino's or any of the other commercial establishments along Route 1.[7]

At best, citizen complaints proved to be nothing short of guesses, precisely the sort of evidence this Court rejected in *Rubin*, 115 S. Ct. at 1593. At worst, the flimsiness of the complaints lent credence to the inference that something else lay behind them.

In short, by the end of discovery the record established, at a minimum, a serious dispute of fact as to whether so-called citizen complaints were *substantial*, for the foundation of the complaints had been pulverized and the existence of racial prejudice had come to the surface. Nonetheless, the First Circuit would not permit a trial to resolve this or any other factual dispute this case presents. Its affirmance of summary judgment works a disservice to the First Amendment that should be rectified promptly by this Court's remand for trial.

Summary reversal is also warranted by the conflict of fact over constabulary concerns. Any serious scrutiny of this record discloses that a so-called pattern of incidents neither related to midnight movies nor caused the constabulary any concern about them.

The testimony of Chief Teehan and Lieutenant Greenwood establishes that, despite rumblings of a less safe neighborhood, there was no evidence of boisterous behavior, squealing tires, or

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7. The record reflects other examples of fabricated evils that could have been subjected to objective investigation. For example, at Town Meeting one complainant imagined 2,000 cars exiting the parking lot at 2 a.m. The estimate is now down to 350 cars. Resp. Br. at 14. But that number too is greatly exaggerated. It assumes that the eight to ten theaters let out at once; they do not. It also forgets that couples usually attend in one car, particularly on the weekends, the only days when midnight movies are shown.

more than intermittent traffic, much less "serious crimes".[8] (R. A1544; A1113-14). In the most egregious of Respondent's innuendos to the contrary, its Brief pointedly mentions a late night stabbing on March 8, 1991, long after adoption of the by-law, even though Dedham has *nothing* to support the supposition that the stabbing was committed by late night patrons.[9]

Lacking believable citizen complaints or any pattern of incidents and constabulary concern, Dedham resorts to the last resort — "commonsense", *i.e.* commercial entertainment attracts crowds, crowds cause commotion, therefore the Town is justified in banning the late-night showings. But "commonsense" is just another name for "rational basis" analysis that, however appropriate to test economic legislation, has no place in determining the constitutionality of a First Amendment ban.[10]

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8. Chief Teehan testified that only five incidents occurred after the midnight movies between the hours of 1 a.m. and 6 a.m. (R. A2088); and four of the five involved property damage to automobiles that probably occurred before 1 a.m. when calls were received at the Police Station. (R. A1055). Only one incident conceivably related to the exhibition of midnight movies. Thus, there was no "pattern" of incidents to produce "constabulary concern"; and the First Circuit's finding of a "pattern" in the absence of any testimony to that effect, not only lacks an evidentiary foundation, but is in and of itself impermissible fact finding at this stage of the proceedings.

9. The Dedham police blotter shows that it shares in the crime problem that plagues this country. But of 106 assaults in Dedham between January 1990 and the date of the stabbing, only this stabbing incident occurred during the exhibition of the midnight movies. (R. A2029-87).

10. Respondent's brief provides an excellent example of how "commonsense" can mislead. To establish that "peace and tranquility" were at issue in the by-law, Respondent quotes from the testimony of Robert Cedrone. Resp. Br. at 10.

> The people in this neighborhood got to go to sleep. If

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The First Amendment clearly commands more, as *Edenfield, Turner Broadcasting* and *Coors Brewing* make clear:

> In *Edenfield*, we decided that the Government carries the burden of showing that the challenged regulation advances the Government's interest "in a direct and material way" (citation omitted) That burden "is not satisfied by mere speculation and conjecture; rather a governmental body seeking to sustain a restriction on commercial speech must demonstrate the harms it recites are real and that its restriction will in fact alleviate them to a material degree." (citation omitted) We cautioned that this requirement was critical; otherwise, "a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.

Rubin, 115 S. Ct. at 1591.

To ensure that its pronouncements in the First Amendment area have teeth, this Court must insist that an alleged justification for a restriction on speech is supported by substantial evidence — not just speculation, conjecture, or their rough equivalent

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> they hear a noise outside, they're awake. They're sleeping on eggs out there.

How does Mr. Cedrone know that people are awakened? By what noise? Commonsense may suggest that late night movies will engender disturbing noise, but the only elderly person who testified on deposition, Mrs. Magdalene Wallstrom, reported that she was unaware of any traffic or noise problems in the neighborhood after midnight. (R. A1687).

"commonsense". Where, as here, there is a conflict in the evidence as to the alleged justifications for banning midnight movies, this Court should insist that a full trial — the traditional crucible for determining the facts — be held.

Moreover, this Court's insistence should be intensified where there is evidence of an illegitimate motive at play in adopting the regulation in question.[11]

There is evidence in this record that the real genesis of Dedham's by-law was the new resident's effort to put his neighbors in fear of "race riots" and veiled concerns of others about "out-of-towners" that masked racial biases. *See* Pet. 6-7. In addition, as Respondent notes, Resp. Br. at 18, Showcase has an expert in the field of sociology with special knowledge of racism who studied the adoption of the by-law and concluded that the forced closing of midnight movies would be an act of institutional discrimination against Showcase's black patrons.[12]

Finally, Respondent's reliance upon *Renton,* is misplaced. Respondent reads *Renton* as holding that a legislature may rely upon "whatever evidence it 'reasonably' believes to be relevant" when a regulation is targeted at the secondary effects of speech. Resp. Br. at 11. But even that formulation of the issue raises a

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11. Dedham's contention that its by-law was simply part of a twenty-year progression of by-laws designed to insure that commercial activities did not impinge on private life is groundless. Resp. Br. at 11. For example, Dedham took no such action of any kind between 1980 and 1989. (R. A48-49). Presumably, had Dedham enacted its by-law in 1999, it would characterize the by-law as part of a thirty-year progression.

12. Evidence of legislative motive may be taken to bear upon the issue of discriminatory intent. *Church of The Lukumi Babalu Aye, Inc. v. City of Hialeah*, ___ U.S. ___, 113 S. Ct. 2217 (1993). *See also, Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279, n.24 (1979).

disputed question of fact as to whether it was *reasonable* for Dedham to rely upon the flimsy evidence it had, after 10 years of experience with midnight films. *Renton* certainly did not sanction municipal reliance upon citizen complaints, but rather highlighted the importance of objective studies, even if, as in *Renton,* they are done in other relevant locations.[13] The fundamental point is that whether a belief is "reasonable" is determined under an objective, not a subjective, standard: *e.g.,* would the ordinary reasonable man deem the self-serving citizen complaints in this case to be credible.[14] This question is standard grist for the trial process where, as here, pre-trial discovery exposes the incredulity of alleged complaints.

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13. The credibility of studies involved in the *Renton* case was not at issue because the studies had been tested in an earlier trial in Seattle and approved by the Washington Supreme Court. *Northend Cinema Inc. v. Seattle,* 585 P.2d 1153 (Wash. 1978), *cert. denied,* 441 U.S. 946 (1979). In any event, Dedham neither made nor relied upon any studies, whatsoever.

14. Reasonableness can only be assessed in light of all the facts and circumstances. For example, in this case citizen complaints about midnight movie patrons making noise at a bus stop might seem credible until a review of bus schedules showed that the buses stop before the movies end. (R. A2713-29).

CONCLUSION

Ironically, Respondent's brief eloquently testifies to the factual conflicts that required a trial here. This Court should grant the petition for certiorari and reverse the summary proceedings below so that a full trial may be had during which the evidence supporting the public interests allegedly favoring the First Amendment ban are put to the test. Alternatively, the petition should be granted to permit full review of the issue and the conflict in the circuits created by the First Circuit's decision.

Respectfully submitted,

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